

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
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U.S. BANKRUPTCY COURT
DIST OF SOUTH CAROLINA

IN RE:)	BANKRUPTCY CASE NO. 97-07229-W
)	
Air South Airlines, Inc.,)	CHAPTER 7
)	
<u>Debtor.</u>)	
W. Ryan Hovis, Trustee,)	Adversary Proceeding No. 99-80166-W
)	
Plaintiff,)	
)	
vs.)	ORDER
)	
ITS, Incorporated,)	
)	
<u>Defendant.</u>)	

ENTERED
SEP 02 1999
J.G.S.

THIS MATTER comes before the Court upon a Motion for Relief from Default Judgment filed by ITS, Incorporated.

The Adversary Complaint was filed on May 14, 1999. According to the Certificate of Mailing filed June 19, 1999, copies of the Summons and Complaint were sent via first class mail, postage prepaid, to the Defendant at the following address:

ITS Incorporated
Attention: Officer, Managing or General Agent
Crown Centre
5005 Rockside Road
Cleveland, Ohio 44131

No answer or other responsive pleading was filed or served within thirty (30) days of the date of such mailing, and, on July 1, 1999, default was entered. Judgment by default was entered on

July 6, 1999. On July 16, 1999, the Defendant, through counsel, moved for relief from the judgment, attaching an affidavit by its Assistant General Counsel to the motion.

The Defendant made two arguments at the hearing. The first argument was that the judgment was void as the Summons and Complaint had not been properly served. The second was that its failure to answer within the allotted time was the result of mistake, inadvertence, surprise, or excusable neglect. Either argument would provide grounds for relief from a final judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure,¹ which applies to cases under the Bankruptcy Code pursuant to Bankruptcy Rule 9024.

As to the first, the Court finds and concludes that the Summons and Complaint were properly served on the Defendant. Bankruptcy Rule 7004(b)(3) specifically provides for the service of process upon a domestic or foreign corporation by mailing a copy of the summons and complaint to the attention of an officer, a managing agent, or a general agent.

Further, it has been held that proof of mailing in accordance with Rule 7004(b) gives rise to the presumption of proper service,

¹ Further references to the Federal Rules of Civil Procedure shall be by rule number only. Further references to the Federal Rules of Bankruptcy Procedure shall be by reference to bankruptcy rule number.

which can be overcome only by clear and convincing evidence to the contrary. See, e.g., In re Levoy, 182 B.R. 827, 834 (B.A.P. 9th Cir. 1995). During the hearing, counsel for the Defendant conceded that the Defendant received correspondence from the attorneys for the Trustee which had been sent to it at the same address indicated in the Certificate of Mailing. He also conceded that the Defendant could offer no definitive explanation for what had happened to the Summons and Complaint; only that they had not been received by either its General Counsel or Assistant General Counsel in accordance with established corporate policy. Therefore, the Court does not find that Defendant's proof meets the standard for relief under Rule 60(b)(4).

The Defendant's second argument is to be evaluated under the standards set forth in Rule 60(b) and the decision in Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. 1988). To obtain relief from a default judgment, the movant must show the following: (1) that the motion was made timely; (2) that the nonmoving party will not suffer unfair prejudice if the judgment is set aside; and (3) that there is a meritorious defense. See Holland v. Virginia Lee Co., No.2:95CV00155, 1999 WL 566816, at *6 (W.D. Va. July 23, 1999) (quoting Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987)); see also Heyman v. M.L. Mktg. Co., 116 F.3d 91, 93 n.3

(4th Cir. 1997).

The motion for relief was made within ten (10) days of the entry of the judgment and was heard by this Court within thirty (30) days. During this time, the Trustee had not undertaken any efforts to collect the judgment. Furthermore, the Trustee stipulated at the hearing that the Defendant's filing of an Answer asserting certain defenses to the Complaint, including affirmative defenses, met the requirement of a showing of a meritorious defense. For these reasons, and because any prejudice to the estate can be mitigated by a less drastic sanction, the Court finds and concludes that the Defendant has made a sufficient showing of excusable neglect to set aside the default and judgment by default in accordance with Rule 60(b)(1).

The Court further finds that the Trustee has incurred delay and expense in the preparation and filing of the default and order for judgment as well as in the defense of this motion, and that it is appropriate for those fees and costs to be reimbursed to the estate by the defaulting party. Based upon the Trustee's estimate provided at the hearing with which this Court agrees given the stature of counsel, the complexity of the issues involved, the amount of time expended, and the rates generally charged for comparable services in this District, the Court finds and concludes a fee and cost award of \$500.00 to be paid by the Defendant to the

Trustee on behalf of the estate within ten (10) days is an appropriate sanction. It is, therefore,

ORDERED that the Defendant be granted relief from the entry of default and Order for judgment heretofore entered in this case and the matter set for further proceedings. It is further

ORDERED that within ten (10) days of this Order the Defendant pay the Trustee on behalf of the estate \$500.00 for his fees and expenses in connection with the default and this motion.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
September 1, 1999

CERTIFICATE OF MAILING
The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

SEP 2 1999

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

JUDY G. SMITH

Deputy Clerk

McKnight
RTA